

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

ENZO LIFE SCIENCES, INC.,)	
Plaintiff,)	04-CV-01555 (RJS)
vs.)	ECF Case
AFFYMETRIX, INC.,)	
Defendant,)	
AND RELATED CASES NAMING)	02-CV-08448 (RJS)
MOLECULAR PROBES, INC.,)	03-CV-03817 (RJS)
PERKINELMER, INC., PERKINELMER)	03-CV-03819 (RJS)
LIFE SCIENCES, INC., ORCHID)	03-CV-03816 (RJS)
BIOSCIENCES, INC., ENZO BIOCHEM,)	03-CV-08907 (RJS)
INC., ENZO LIFE SCIENCES, INC.,)	04-CV-04046 (RJS)
AFFYMETRIX, INC., ROCHE)	
DIAGNOSTICS GMBH, AND)	
ROCHE MOLECULAR SYSTEMS, INC.)	
AS DEFENDANTS, PLAINTIFFS,)	
AND/OR DECLARATORY JUDGMENT)	
PLAINTIFFS.)	

AFFYMETRIX, INC.'S STATEMENT PURSUANT TO LOCAL RULE 56.1

Pursuant to Rule 56.1 of the Local Rules of the United States District Court for the Southern District of New York, Affymetrix, Inc. submits the following statement of material facts as to which there is no genuine issue to be tried.

1. In April 1998, Enzo Diagnostics, Inc. and Affymetrix, Inc. entered into a “Distributorship Agreement” (the “Agreement” or “Agmt.”). Declaration of Vernon A. Norviel, dated December 19, 2006 (“Norviel Decl.”) ¶ 4.
2. The Agreement “appointed” Affymetrix a “nonexclusive worldwide distributor” of certain Enzo “reagents” used “in nucleic acid labeling and detection.” Agmt. §1, p. 2. The

Agreement termed these particular reagents “PRODUCTS,” and specifically listed them all in its Exhibit B. *Id.* and Exhibit B thereto; Norviel Decl. ¶¶ 4, 10.

3. The Agreement defines “PRODUCT” as follows: “PRODUCT means an individual reagent, component or combination thereof including kits for use in nucleic acid labeling and detection, the manufacture, use or sale of which is covered by one or more claims of ENZO PATENTS (EXHIBIT A), the PRODUCTS being listed in EXHIBIT B.” Agmt., p. 2.

4. Enzo and Affymetrix could have agreed to add further products to Exhibit B of the Agreement, thus making such products “PRODUCTS” under the Agreement. Agmt. Ex. B, p. 1; Norviel Decl. ¶¶ 4, 10. But Enzo and Affymetrix never agreed to add further products to the Agreement’s Exhibit B. Declaration of Lisa A. Cowell, dated December 20, 2006 (“Cowell Decl.”) ¶ 2.

5. In addition to distribution rights, the Agreement gave Affymetrix certain rights to use Enzo’s reagent PRODUCTS in, *inter alia*, its product development work. Agmt. § 5. In turn, Enzo was granted back certain rights to improvements and inventions that Affymetrix might make regarding these particular reagents while using them. *Id.*

6. The rights noted in Paragraph 5 above are addressed in the following provisions of Section 5 of the Agreement:

ENZO agrees to permit AFFYMETRIX to use PRODUCTS and ENZO’s confidential information (“C.I.”) as defined in Section 14 below only for the following purposes and AFFYMETRIX agrees that its use of same shall be limited to:

- (a) performing quality control procedures for the PRODUCTS,
- (b) optimizing the function of GeneChip® products and GeneChip® Assays; and
- (c) developing new gene chip products.

If any invention or product is conceived during the course of AFFYMETRIX' use of the PRODUCTS and/or ENZO's C.I. and is directed to the PRODUCTS, or their use, or improvements thereto, AFFYMETRIX will have the rights to such inventions and products for novel gene chip products, and ENZO will retain all other rights to such inventions and products including but not limited to those for labeling and detection processes and components therefor.

7. The Affymetrix package insert to which Enzo agreed stated that "Enzo's products" were for "research use only." Cowell Decl. ¶ 3.

8. A Roche-created label is used with the AmpliChip CYP450 arrays. Neither an Affymetrix label nor an Enzo label is so used. Declaration of Stephen Will, dated December 20, 2006 ("Will Decl.") ¶ 6.

9. One Enzo labeling reaction could be – and was – used by Affymetrix customers to generate labeled samples sufficient for application to multiple GeneChips, not just one. Cowell Decl. ¶ 4.

10. Affymetrix's customers could – and did – buy the Enzo kits from Enzo, or from Enzo's other distributors. Cowell Decl. ¶ 5.

Dated: December 21, 2012

Respectfully submitted,

By: /s/ Peter E. Root

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